

**Sep 24, 2010**

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**BEFORE THE JUDICIAL PANEL  
ON MULTIDISTRICT LITIGATION**

IN RE: DEPUY ORTHOPAEDICS, INC.,  
ASR HIP IMPLANT PRODUCTS LIABILITY  
LITIGATION

MDL-2197

**PLAINTIFFS' RESPONSE AND MEMORANDUM OF LAW IN  
SUPPORT OF TRANSFER, COORDINATION, AND  
CONSOLIDATION PURSUANT TO 28 U.S.C. § 1407**

Pursuant to 28 U.S.C. § 1407, moving Plaintiffs, **TABETHA LONG, PAUL LONG,**  
**and CHRISTINE ALSPAUGH**, respectfully submit this Response and Memorandum of Law in  
support of their request that all civil actions now pending in federal court against Depuy  
Orthopaedics, Inc., as well as subsequently filed related cases, to the U.S. District Court for  
Northern District of Illinois for consolidated pretrial proceedings.

For the reasons set forth below, Plaintiffs respectfully request that the Panel consolidate  
and transfer all of the related civil actions to the U.S. District Court for the Northern District of  
Illinois. Additionally, Plaintiffs would suggest that the Judges currently presiding over the three  
pending civil actions within said District, as described herein below, are well-capable and suited  
to preside over consolidated pretrial proceedings.

**I. BACKGROUND OF THE LITIGATION**

DePuy Orthopaedics, Inc., a member of the Johnson & Johnson Family of Companies,  
among the most well-known orthopedic device companies in the world, designed and

manufactured a platform of hip prosthesis called the DePuy ASR™<sup>1</sup> (hereinafter “ASR”). In January of 2010, several prominent members of the orthopedic scientific community published data relating to devices confirming an increased risk of early failure due to metal on metal wear between the femoral and acetabular components of the ASR.<sup>2</sup> On March 8, 2010, Pamela L. Plouhar, Vice President of Worldwide Clinical Affairs for DePuy, issued an “URGENT FIELD SAFETY NOTICE” to surgeons concerning a high amount of revisions of people who received the ASR prosthesis. The recall covers 29 models of the ASR 100 and ASR 300 Acetabular Implants in cup sizes ranging from 44mm to 70 mm. On or about August 27, 2010, DePuy initiated a voluntary recall of the various ASR components citing higher than unusual revision rates relating to DePuy’s ASR resurfacing device (12% rate) and DePuy’s ASR total hip replacement device (13%).<sup>3</sup> The number of ASR hip devices that were placed within the stream of commerce in the United States is 37,834.<sup>4</sup> Accordingly, though it is believed that the actual rate of failure will be considerably higher than reported, at a bare minimum there are over 4,500 consumers across the country with ASR components who have suffered premature failure and/or are presently suffering early wear and imminent failure. As a result, Plaintiffs and others

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<sup>1</sup> ASR is an acronym for Articular Surface Replacement.

<sup>2</sup> (Langton DJ, Jameson SS, Joyce TJ, Hallab NJ, Natsu S, Nargol AV. Early failure of metal-on-metal bearings in hip resurfacing and large-diameter total hip replacement: A consequence of excess wear. *J Bone Joint Surg [Br]*. 2010 Jan;92(1):38-46). <http://www.ncbi.nlm.nih.gov/pubmed/20044676>

<sup>3</sup> <http://www.depuy.com/corporate-information/depuy-divisions/depuy-orthopaedics-inc/landasr>

<sup>4</sup> [http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfres/res.cfm?start\\_search=1&event\\_id=55575&productdescriptiontxt=&centerclassificationtypetxt=&recallnumber=&postdatefrom=&postdateto=&productshortreaso.txt=&firmlegalnam=&pagenum=10&sortcolumn=cca](http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfres/res.cfm?start_search=1&event_id=55575&productdescriptiontxt=&centerclassificationtypetxt=&recallnumber=&postdatefrom=&postdateto=&productshortreaso.txt=&firmlegalnam=&pagenum=10&sortcolumn=cca)

similarly situated have sustained personal injury and economic losses and will continue to suffer the same in the future.

## **II. ARGUMENT**

### **A. TRANSFER AND CONSOLIDATION INTO A NEW AND SEPARATE MDL WILL PROMOTE THE JUST AND EFFICIENT CONDUCT OF THE LISTED ACTIONS**

#### **1. SIMILARLY SITUATED CASES**

There are at least fourteen (14) civil actions presently pending in federal jurisdictions, three (3) of which are pending in the U.S. District Court for the Northern District of Illinois. The federal court DePuy ASR hip litigation actions pending outside of the Northern District of Illinois are situated in the U.S. District Courts for the Central District of California, Northern District of California, Middle District of Florida, Eastern District of Louisiana, District of Maryland, District of New Jersey, Eastern District of New York, District of South Carolina and the Northern District of Texas.

In prior cases, the Panel has identified advantages in transferring and consolidating cases before a district court in which one of the constituent actions is pending. See *Suzuki Samurai*, 1988 U.S. Dist. LEXIS, at \*2; *Dalkon Shield*, 406 F. Supp. at 542.

#### **2. COMMON QUESTIONS OF LAW AND FACT**

A review of the listed complaints attached to the Plaintiffs' Motion for Transfer, Coordination, and Consolidation, attached as Exhibit A, clearly demonstrate common questions of law and fact between the suits. Each of these actions involves allegations that the DePuy ASR hip acetabular components implanted in patients failed prematurely, resulted in significant harm to individuals. All of the actions involve one or more common questions of fact as required by 28 U.S.C. § 1407(a), in that they are premised on virtually identical factual allegations arising from premature failure of the DePuy ASR hip devices. Transfer, coordination, and/or

consolidation of actions is appropriate when (1) the actions involve one or more common questions of fact; (2) the transfer would serve the convenience of the parties and witnesses; and (3) the transfer would promote the just and efficient conduct of the actions. 28 U.S.C. § 1407.

The transfer and consolidation of these suits will serve the convenience of the parties and witnesses and promote judicial economy. National coordination of discovery and other pre-trial efforts will prevent duplicative and potentially conflicting pretrial rulings, will reduce the costs of litigation and allow cases to proceed more efficiently to trial. Specifically, consolidation avoids problems such as those caused by a myriad of duplicative discovery demands and redundant depositions in different actions. Consolidation avoids this by enabling a single judge to formulate a pretrial discovery program that minimizes witness inconvenience and overall expense. See *Cooper Tire*, 2001 WL 253115, at \*1 (consolidation ordered because “[m]otion practice and relevant discovery will overlap substantially in each action”); *In re Cuisinart Food Processor Antitrust Litig.*, 506 F.Supp 651, 655 (J.P.M.L. 1981) (transfer would “effectuate a significant overall savings of cost and a minimum of inconvenience to all concerned with the pretrial activities”).

**B. THE NORTHERN DISTRICT OF ILLINOIS IS A WELL PREPARED AND CONVENIENT VENUE TO HANDLE THIS MDL**

**1. JUDGES IN THE NORTHERN DISTRICT OF ILLINOIS ARE EXCEPTIONALLY QUALIFIED AND EXPERIENCED**

Currently, the following cases are pending within the Northern District of Illinois:

*Fitzgerald v. DePuy Orthopaedics, Inc., et al*, Case No.: 1:10-cv-04822 (J. Darrah)

*Long v. DePuy Orthopaedics, Inc.*, Case No.: 1:10-cv-05785 (J. St. Eve)

*Alsbaugh v. DePuy Orthopaedics, Inc.*, Case No.: 1:10-cv-06000 (J. Norgle)

The Honorable Judge John W. Darrah, the Honorable Judge Amy J. St. Eve and the Honorable Judge Charles R. Norgle, Sr. are all remarkably well-suited to hear this litigation, due to their respective experience with complex litigation, multiple party actions, and efficient management of their dockets.

The Honorable Judge John W. Darrah has served the U.S. District Court for the Northern District of Illinois since 2000. Judge Darrah is a very knowledgeable and capable jurist with experience presiding over product liability cases including a number of orthopedic device and pharmaceutical drug cases. Judge Darrah is not currently assigned to an MDL.

The Honorable Judge Amy J. St. Eve<sup>5</sup> has served the U.S. District Court for the Northern District of Illinois since 2002. Judge St. Eve has experience with managing trial cases related to medical issues, specifically presiding over a bench trial in *Arroyo v. United States of America*, Case No.: 1:07-cv-04912, which involved the application of the Federal Tort Claims Act within the context of a birth related injury. Judge St. Eve presided over MDL 1778 which resulted in an efficient adjudication of pretrial matters in her Court leading to a resolution of the underlying claims and is currently assigned to MDL 2147 IN RE: AT&T Mobility Wireless Data Services Sales Tax Litigation.

The Honorable Judge Charles R. Norgle, Sr. is also exceptionally qualified to manage this MDL docket. Having served the Northern District of Illinois since 1984, Judge Norgle has heard cases ranging from multi-district litigation to large shareholder class action to product defect cases. Judge Norgle is currently assigned to MDL 1491 IN RE: African-American Slave

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<sup>5</sup> This Panel has expressly recognized Judge St. Eve as being well qualified to oversee such matters. *See, e.g., In re Ocean Fin. Corp. Prescreening Litig.*, 435 F. Supp. 2d 1350, 1352 (J.P.M.L. 2006) (noting that Judge Amy J. St. Eve was “an experienced transferee judge”).

Descendants Litigation (with only one of ten original actions remaining); and MDL-1604 IN RE: Ocwen Federal Bank FSB Mortgage Servicing Litigation.

## 2. **THE NORTHERN DISTRICT IS CENTRALLY LOCATED**

The Northern District of Illinois is logistically central to litigants across the country. The Panel has often expressed a concern for the idea of "centrality" in selecting a district that best represents the stakeholders involved. See e.g., *In re TJX Companies, Inc.*, 505 F. Supp. 2d 1379, 1380 (I.P.M.L. 2007); *In re Merck & Co. Securities, Derivative & ERISA Lit.*, 360 F. Supp. 2d 1375, 1377 (I.P.M.L. 2005); *In re Federal Nat Mort. Ass 'n Securities Derivative & ERISA Lit.*, 370 F. Supp. 2d 1359, 1361 (I.P.M.L. 2005); *In re Express Scripts, Inc. Pharmacy Benefits Management Lit.*, 368 F. Supp. 2d 1356, 1357 (J.P.M.L. 2005). A variety of tests result in Chicago, Illinois as among the best choice geographically for selection as the location for administration of this MDL.

Chicago is among the most convenient locations in the country. Specifically, Chicago hosts two major airports: the O'Hare International Airport and Chicago Midway International Airport. O'Hare is the fourth busiest airport in the world with 64,397,782 passengers passing through the airport in 2009 and serves as the primary and largest hub for United Airlines and a significant hub for American Airlines.<sup>6</sup> Midway is a significant hub for Southwest Airlines and services its other two major operators, AirTran Airways and Delta Air Lines with 17,089,365 passengers passing through the airport in 2009.

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<sup>6</sup> <http://www.ohare.com/Statistics/stats/1209SUMMARY.pdf>

Many passengers traveling to destinations in neighboring or nearby States, such as Indiana, travel through and catch connector flights at one of Chicago's two international airports, making Chicago the most convenient mid-west city for travel.

3. **FACTUALLY, ILLINOIS HAS A SIGNIFICANT AMOUNT AT STAKE**

The DePuy ASR recall is a matter affecting a large number of consumers nationwide and will undoubtedly have far-reaching consequences. However, comparatively speaking, Illinois has a significant connection to the ASR recall. Specifically, among the several hundred physicians who were trained with respect to the implantation of the ASR, 25 orthopedic surgeons from Illinois are listed as trained in the implantation of the ASR.<sup>7</sup>

4. **COMPARISON OF DOCKET CONDITIONS DEMONSTRATES THAT THE NORTHERN DISTRICT OF ILLINOIS IS EQUIPPED TO MANAGE THIS MDL**

The respective docket conditions of the Courts in the proposed districts are a factor that the Panel has considered in selecting the appropriate court for transfer. *In re Teflon Prods Liability Lit.*, 416 F. Supp. 2d 1364, 1365 (J.P.M.L. 2006); *In re Xybernaut Corp. Securities Lit.*, 403 F. Supp. 2d 1354, 1355 (J.P.M.L. 2005); *In re Educational Testing Service PLT 7-12 Test Scoring Lit.*, 350 F. Supp. 2d 1363, 1365 (J.P.M.L. 2004).

When compared to other proposed districts, the status of the Northern District of Illinois weighs in its favor in terms of transfer to its docket. The Northern District of Illinois' docket is well suited to handle the demands of this case and for this significant reason; the Panel should favor the Northern District of Illinois.

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<sup>7</sup> <http://www.hipreplacement.com/DePuy/find/index.html> (a query within DePuy's website relating to physicians "trained" to implant the ASR rendered 25 such physicians primarily in the Chicago area).

In an MDL matter, “[t]he percentage of cases over three years old is an especially useful basis for comparing the various court dockets.” D. Herr, *Multidistrict Litigation Manual: Practice Before the Judicial Panel on Multidistrict Litigation* § 6:17 at 210-11 (2008). The Northern District of Illinois had 11.7% of its civil cases pending for three years or more. *Judicial Business of the United States Courts, 2009 Annual Report of the Director* (“*Annual Report*”).<sup>8</sup> The importance of the median time to disposition in the district courts has previously been recognized by the Panel as an important consideration. *In re National Student Marketing Lit.*, 368 F. Supp. 1311, 1318 (J.P.M.L. 1972). The Northern District of Illinois’ median time to disposition for all cases is a mere 6.2 months (only 9 other Districts in the country had better marks). *Annual Report*.<sup>9</sup> These facts demonstrate the Northern District of Illinois’ ability to resolve this case in a timely and efficient manner.

Another demonstration of the efficiency of the Northern District of Illinois can be seen in comparing the number of cases per judge. The Northern District of Illinois, with twenty-two authorized judgeships has 378 pending civil cases per judge. *Annual Report*.<sup>10</sup> Though a busy docket, this compares favorably with other districts. *Id.*

WHEREFORE, Plaintiffs respectfully file this motion in support of the consolidation of all genuinely related matters for pretrial proceedings and transfer of the same to the Northern District of Illinois. Additionally, judges in the Northern District, the Honorable John W. Darrah, the Honorable Judge Amy J. St. Eve and the Honorable Judge Charles R. Norgle, Sr., are all

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<sup>8</sup> [www.uscourts.gov/judbususc/judbus.html](http://www.uscourts.gov/judbususc/judbus.html).

<sup>9</sup> <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2009.pl>.

<sup>10</sup> <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2009.pl>.



well-suited and qualified to hear this litigation, due to their respective experience and efficient management of their dockets.

Dated: September 23, 2010

Respectfully submitted,

/s/ Douglass A. Kreis

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TABATHA LONG, PAUL LONG, AND  
CHRISTINE ALSPAUGH**

BEFORE THE JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION

**Sep 24, 2010**

**In Re: DePuy Orthopaedics ASR  
Hip Implant Litigation**

**MDL – 2197**

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**AMENDED PROOF OF SERVICE**

I hereby certify that a copy of the foregoing Response, Schedule of Actions and this Amended Certificate of Service was served by U.S. Mail on September 24, 2010 to the following:

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# EXHIBIT “A”

**Before the Judicial Panel on Multidistrict Litigation**  
**MDL – 2197 – In Re: DePuy Orthopaedics ASR Hip Implant Litigation**

**SCHEDULE OF ACTIONS**

<b>Case Captions</b>	<b>Court</b>	<b>Civil Action No.</b>	<b>Judge</b>
<b>Plaintiffs:</b> Beth E. Bubernak <b>Defendants:</b> DePuy Orthopaedics, Inc.; DePuy, Inc.; Johnson & Johnson; and Does 1to 100, inclusive.	C.D. California	2:10-cv-06542	Stephen V. Wilson
<b>Plaintiffs:</b> Maurice Brigham, and all others similarly situated <b>Defendants:</b> DePuy Orthopaedics, Inc.; Johnson & Johnson Services, Inc.	N.D. California	3:10-cv-03886	Susan Illston
<b>Plaintiffs:</b> Kathleen Margenau <b>Defendants:</b> DePuy Orthopaedics, Inc.	M.D. Florida	2:10-cv-00369	Charlene E. Honeywell
<b>Plaintiffs:</b> Patrick Joseph Fitzgerald <b>Defendants:</b> DePuy Orthopaedics, Inc.; Johnson & Johnson	N.D. Illinois	1:10-cv-04822	John W. Darrah
<b>Plaintiffs:</b> Tabetha Long, Paul Long <b>Defendants:</b> DePuy Orthopaedics, Inc.	N.D. Illinois	1:10-cv-05785	Amy J. St. Eve
<b>Plaintiffs:</b> Christine Alspaugh <b>Defendants:</b> DePuy Orthopaedics, Inc.	N.D. Illinois	1:10-cv-06000	Charles R. Norgle, Sr.
<b>Plaintiffs:</b> Ida Mosley <b>Defendants:</b> DePuy Orthopaedics, Inc., Johnson & Johnson Services, Inc.	E.D. Louisiana	2:10-cv-03206	Eldon E. Fallon

<b>Plaintiffs:</b> Sandra Bloom <b>Defendants:</b> DePuy Orthopaedics, Inc.	D. Maryland	1:10-cv-02170	Benson Everett Legg
<b>Plaintiffs:</b> Vicki Aiken <b>Defendants:</b> DePuy Orthopaedics, Inc., Johnson & Johnson	D. New Jersey	3:10-cv-04545	Joel A. Pisano
<b>Plaintiffs:</b> Jason Short <b>Defendants:</b> DePuy Orthopaedics, Inc., Johnson & Johnson	D. New Jersey	1:10-cv-04783	Robert B. Kugler
<b>Plaintiffs:</b> Debra Solomon, Gregory Solomon <b>Defendants:</b> DePuy Orthopaedics, Inc., Johnson & Johnson	E.D. New York	1:10-cv-04242	Sandra L. Townes
<b>Plaintiffs:</b> Elizabeth Mixon <b>Defendants:</b> DePuy Orthopaedics, Inc.	D. South Carolina	0:10-cv-02422	Matthew J. Perry
<b>Plaintiffs:</b> Rachel Cox <b>Defendants:</b> DePuy, Inc., Johnson & Johnson, Ortho-McNeil Pharmaceutical, Inc. Johnson and Johnson Pharmaceutical Research & Development	N.D. Texas	3:10-cv-01406	Barbara M.G. Lynn
<b>Plaintiffs:</b> Jerre Frey <b>Defendants:</b> DePuy Orthopaedics, Inc. Johnson & Johnson Services, Inc.	N.D. Texas	3:10-cv-01787	Jane J. Boyle

<b>Plaintiffs:</b> Hilda Frances Williams, William Williams <b>Defendants:</b> DePuy Orthopaedics, Inc.; Ceramtec AG	D. Utah	2:10-cv-00691	Clark Waddoups
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